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IN THE
SUPREME COURT OF THE UNITED STATES

REMON LEE,

Petitioner,

vs.

MICHAEL KEMNA,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Did the state trial court violate petitioner's due process rights by not granting a continuance during a criminal trial because of the disappearance of three defense witnesses, when the trial court was not told why the witnesses left nor given any reasonable assurances that they could be found promptly and would testify?

2. Should the district court have granted an evidentiary hearing to consider the explanations of alibi witnesses for why they left the courthouse prior to testifying, when no explanations were offered to the trial court in the motion for new trial, or at a hearing weeks after trial?

3. Is a due process challenge to the denial of a motion for continuance, based on the unexplained disappearance of defense witnesses during trial, procedurally barred from federal habeas corpus review by the opinion of the Missouri Court of Appeals which rejected the claim for the three independent reasons that: 1) the motion was not in writing as required by Missouri Supreme Court Rule 24.09, 2) the oral motion did not set out the information required by Missouri Supreme Court Rule 24.10 in the case of absent witnesses, and 3) no prejudice from the motion's denial was demonstrated and, if so, should that default be excused when Lee's allegation of "cause" was not responsible for the default and was, itself, separately defaulted, and Lee's showing of "actual prejudice" fell short of any applicable standard?

4. Is there a sufficient showing of actual innocence to remove a procedural default when the current assertions of three family members of a criminal defendant that he was out-of-state at the time of the murder are contradicted by four witnesses who did testify at trial?

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STATEMENT OF THE CASE

On August 27, 1992, in Kansas City, Missouri, Remon Lee waited in his car while Reginald Rhodes shot Steve Shelby several times in the head and neck, killing him. Rhodes then got into Lee's getaway car, and Lee sped away from the scene (JA 124-25). Rhodes pled guilty to the killing (JA 37-38). Lee was tried before a jury, was convicted of first degree murder (JA 42-43), and was sentenced to concurrent terms of life imprisonment without the possibility of parole and ten years' imprisonment for first degree murder, §565.020, RSMo Supp. 1992, and armed criminal action, §571.015, RSMo 1986 (JA 34).

1. State Trial Court Proceedings

During Lee's trial, two eyewitnesses testified that Lee was the getaway driver (JA 124-125). Two other eyewitnesses put Lee in Kansas City on the night before the murder, in the company of the shooter Rhodes, and looking for the victim Shelby (T.Tr. 450-453, 471-474).

On the morning of February 24, 1994, the last day of Lee's three-day trial, the state rested and the defense began its case. Following the lunch recess, defense counsel requested a continuance because Lee's three would-be alibi witnesses -- Lee's mother, sister and stepfather -- could not be found (JA 20, 24). Lee told the court he had seen them at 8:30 a.m. that morning and at one subsequent recess; his attorney stated that the witnesses apparently had left the courthouse at around 11:00 a.m. (JA 17).

No explanation was offered to the court for the witnesses' disappearance, no proffer was made as to their likely testimony, and no assurance was given the court that the witnesses would be located or produced, though Lee said he did not think they had left Kansas City because they had planned to attend a religious service that evening. The trial court indicated it would have to deny the continuance because

it appeared to the court that the witnesses had in effect abandoned Lee (JA 22). Lee's counsel agreed that "[i]t looks like that judge" but stated that he could neither confirm nor deny that the witnesses had abandoned his client (JA 22).

The trial judge also mentioned that on the next day, Friday, he would be at the hospital with his daughter all day and thus could not try the case that day, and that he had another trial scheduled to start the following Monday (JA 22).

On March 11, 1994, more than two weeks after Lee's oral request for a continuance was made and denied, Lee filed a motion for new trial in the trial court (JA 28). He argued that the trial court erred in not granting Lee a one-day continuance to locate his would-be alibi witnesses whom the motion alleged were discovered missing from the witness room by counsel at 11:00 a.m. on February 24, 1994 (JA 31--32). Even two weeks removed from trial, however, Lee's motion offered no explanation why the witnesses left, nor any assurance that the witnesses would have returned to testify had a continuance been granted (JA 31-32). Lee never argued to the trial court, either at trial or in his motion for new trial, that the denial of his oral motion for continuance violated the United States Constitution (JA 20-25, 31-32).

On April 19, 1994, the trial court convened a hearing to consider Lee's motion for new trial, to impose sentence, and, as required by Missouri Supreme Court Rule 29.07, to consider whether there was probable cause to believe trial counsel had been ineffective (JA 33-41). Lee's counsel stood on his argument in the written new trial motion and added no further information or argument to support the motion, and Lee's new trial motion was denied (R.8 (S.Tr. 2, 5)) (JA 42). At this hearing, Lee mentioned nothing about his alibi witnesses and provided no explanation for their disappearance (JA 33). Trial counsel stated in Lee's presence that Lee's alibi witnesses left before testifying and returned to California, and Lee neither disagreed nor offered any explanation for their leaving (JA 37).

2. State Post-Conviction Relief Proceedings

On November 17, 1994, Lee filed a *pro se* motion for post-conviction relief under Missouri Supreme Court Rule 29.15 (JA 45-54). Lee alleged that his trial counsel was ineffective for not requesting an alibi instruction (JA 46-50). Lee did not even acknowledge that his would-be alibi witnesses did not testify, let alone offer any explanation for why those witnesses left the courthouse (JA 46-50). Lee never mentions, let alone ascribes error to, the trial court's denial of Lee's oral motion for a continuance even though Lee acknowledged under oath that he had included all known grounds for vacating the conviction (JA 52).

On July 13, 1995, court-appointed post-conviction counsel filed an amended motion. Only then, more than seventeen months after Lee's oral motion for continuance was made and denied, did Lee claim for the first time that his constitutional rights were violated when an unknown person believed to be working for the prosecutor told his would-be alibi witnesses they could leave (JA 57-59). Thus, the first version of Lee's "someone official told my witnesses they could leave" story was born. In it, Lee maintained that his would-be alibi witnesses were told that their testimony would not be needed at all -- not that they should come back the next day due to the length of the prosecution's case -- and that his relatives retired to another relative's house to await the jury's verdict (JA 57-59). Lee verified the correctness of this information under oath as well (JA 64).

Lee alleged, first, that the denial of his oral motion for continuance violated his due process rights and, second, that his counsel's failure to produce Lee's would-be alibi witnesses despite their disappearance rendered counsel constitutionally ineffective (JA 57-60). The prosecutor responded that no one from the state had spoken with these would-be alibi witnesses other than a detective who had interviewed them on the first day of trial. The prosecutor further pointed out that it was not credible that Lee's

would-be alibi witnesses would leave without consulting the defendant or defense counsel, regardless of who else had spoken to them (Addendum to Appellant's Brief 12a-13a).

The post-conviction review court rejected Lee's due process claim as a claim of trial error cognizable only in Lee's direct appeal, and rejected Lee's ineffective assistance of counsel claim because Lee's counsel was not (and could not be) blamed for the disappearance of Lee's would-be alibi witnesses (JA 69-70).

3. Consolidated Appeal to the Missouri Court of Appeals

Lee, through counsel, briefed a consolidated direct appeal of his conviction and sentence and an appeal of the denial of his motion for post-conviction relief in the Missouri Court of Appeals, Western District (JA 80).

a. Lee's Direct Appeal

In Lee's direct appeal argument challenging the denial of his oral motion for continuance, Lee offered no explanation for the disappearance of his would-be alibi witnesses (JA 90-95). Despite a perfunctory reference to the Due Process Clause of the Fourteenth Amendment to the United States Constitution in the Point Relied On, Lee offered no argument specifically as to how the United States Constitution had been violated, nor did he cite even a single federal case on this issue (JA 90-95).

The State of Missouri argued that the request for continuance did not comply with Missouri Supreme Court Rule 24.10 in that it did not show the materiality of the witnesses' testimony, did not show that the testimony could be obtained in a reasonable time, and was not supported by testimony from Lee that the witnesses' absence was not attributable to him (JA 110-115). The State also argued that, in order to show an abuse of discretion under Missouri law,

Lee was required to show that, had he been granted the continuance, a reasonable probability existed that the outcome of the trial would have been different, which Lee had not and could not show (JA 114-115).

The Missouri Court of Appeals affirmed and gave three independent state law reasons why the trial court's denial of Lee's motion for continuance was proper. First, the court held that the mere fact that Lee's motion for continuance was oral -- and not in writing as required by Supreme Court Rule 24.09 -- was, by itself, adequate basis to deny the motion (JA 126-127). Second, even assuming that an oral motion was sufficient under the circumstances, the Missouri Court of Appeals held that Lee's oral motion was deficient because it did not contain the factual showing required by Missouri Supreme Court Rule 24.10 for a motion for continuance based on an absent witness (JA 127-128).[1] Finally, the Missouri Court of Appeals held that a trial court's failure to grant even a proper motion for continuance is reversible error only if prejudicial, and Lee could not show his would-be alibi witnesses would have created a reasonable probability of an acquittal (JA 128).

b. Lee's Post-Conviction Relief Appeal

In the portion of Lee's consolidated brief challenging the denial of his post-conviction relief motion, Lee alleged that his trial counsel was ineffective because his would-be alibi witnesses had left the courthouse when they were told, by an unknown person believed to be working for the prosecutor, that their testimony was not needed (JA 96-101).

The State of Missouri argued that Lee did not allege any particular deficiency on the part of counsel in connection with the disappearance of his witnesses or the denial of his

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[1]Missouri Supreme Court Rules 24.09 and 24.10 are set forth in full in the Appendix to Petitioner's Brief at 1a-8a.

oral motion for continuance, and that this claim was merely an improper attempt to relitigate the due process claim raised in his direct appeal (JA 119-120).

The Missouri Court of Appeals affirmed the denial of Lee's motion for post-conviction relief under Rule 29.15. The court held, in relevant part, that Lee had wholly failed to allege or prove that the disappearance of his would-be alibi witnesses was in any way the fault of Lee's trial counsel. Thus, the Court concluded, the disappearance of these individuals could not be the basis for an ineffective assistance of counsel claim (JA 131).

4. Habeas Corpus Proceedings

a. United States District Court

On January 16, 1998, Lee filed a habeas corpus petition in the United States District Court for the Western District of Missouri (JA 132). For the first time, Lee alleged that the prosecutor tricked Lee's would-be alibi witnesses into leaving by having a court officer tell the witnesses they would not be needed until the following day, and then rushing the case to completion so there would be no following day of trial (JA 154-156). Lee alleged that, by presenting a list of twenty-three witnesses, the prosecutor led the witnesses to believe that the state's case would take up the rest of the day, and then sent a court officer to tell the witnesses they would not be needed until the next day (JA 137).

Gone without a trace was the earlier version of this story offered at the post-conviction relief stage in which an "unknown person, believed to be working for the prosecutor," told the witnesses their testimony would not be needed at all and thus they had gone to a relative's house to await the verdict (the "PCR Version"). Gone also was the version presented at the new trial/sentencing hearing in which the witnesses simply left and returned to California without explanation (the "Trial Court Version") (JA 37-41, 57-59).

This "the prosecutor tricked my witnesses into leaving and coming back tomorrow" version (the "Habeas Version") formed Lee's basis for his habeas claims that the prosecutor had engaged in misconduct (Ground Three), and that the trial court's denial of Lee's oral motion for a continuance violated his due process rights (Ground Six) (JA 157).

The prison superintendent's response to the prosecutorial misconduct claim pointed out that Lee was procedurally barred from asserting this claim in his habeas petition because it was not presented in his new trial motion or in his consolidated state court appeal (JA 185). The superintendent also argued that this claim was without merit because the record unambiguously demonstrates that the state rested its case at 10:00 a.m. on the morning of February 23, 1994, one hour prior to the time Lee's counsel told the court that Lee's would-be alibi witnesses left the courthouse (JA 186). Thus, the record contradicts Lee's allegation that his would-be alibi witnesses left prior to the close of the state's case because they believed or were told that the state's case would consume the remainder of the day (JA 186).

With respect to Lee's claim that denial of his oral motion for continuance violated his due process rights (Ground Six), the superintendent responded that Lee had failed to adequately raise this claim in state court. Even though he made a perfunctory reference to the United States Constitution in his Point Relied On, Lee failed to advance a specific federal constitutional law theory in the direct appeal argument portion of his brief as required by state law. Moreover, the superintendent argued that Lee's due process claim was procedurally defaulted because the Missouri Court of Appeals affirmed the denial of Lee's motion for continuance not on federal constitutional grounds, but on the independent and adequate state grounds that Lee's motion did not comply with Missouri Supreme Court Rule 24.10, which sets out the information that must be provided in a request for a continuance due to an absent witness (JA 187-188). Finally, the superintendent argued that Lee's due process claim was

substantively without merit because due process does not require a continuance on the basis of the facts as they had been presented to the trial court judge at the time the motion was made and denied (JA 188-189).

In support of his claims, Lee offered the district court affidavits from his three would-be alibi witnesses (JA 163-174). Each affidavit stated that Lee was in California from July to October 1994, and that, while the witnesses were waiting to testify at Lee's trial, they left because they were told their testimony would not be needed until the following day (JA 168-174). One of the affidavits stated that the witnesses had been told this by "those people in Missouri" (JA 169); the other two affidavits called the individual a court officer (JA 170-174). The superintendent argued that the affidavits should not be considered because these would-be alibi witnesses -- members of Lee's family -- could have given this information to Lee and his counsel immediately after trial, in plenty of time to have this information presented to the trial court in the new trial motion, in Lee's direct appeal as a prosecutorial misconduct claim, or in Lee's post-conviction relief motion as an ineffective assistance of counsel claim (JA 209-210).

The district court declined to consider these affidavits because Lee had failed to present them in a timely manner to the appropriate state court, despite this evidence being readily available to Lee and his counsel almost from the moment Lee's relatives walked away from Lee's trial. In addition, the district court held that the affidavits did not demonstrate by clear and convincing evidence that Lee was innocent of the offense charged, or that no reasonable juror would have convicted Lee had they been exposed to these would-be alibi witnesses (JA 215-216).

The district court held that Lee's prosecutorial misconduct claim (Ground Three) was procedurally defaulted due to Lee's failure to raise this claim in his motion for new trial or on direct appeal (JA 213-16). The district court also held that Lee's due process claim (Ground Six) was

procedurally defaulted because the Missouri Court of Appeals rested its decision on the state law grounds that Lee's motion for continuance was not in writing and was not supported by the factual showing required by Rule 24.10. Finally, the district court noted that the Missouri Court of Appeals had held that, even if Lee's motion had been properly presented and properly supported, there was no substantial prejudice to Lee because, even had the would-be alibi witnesses testified, it was not reasonably probable that a different outcome would have resulted (JA 216-217). The district court refused to grant a certificate of appealability (JA 231).

b. United States Court of Appeals

The United States Court of Appeals for the Eighth Circuit granted a certificate of appealability limited to the single issue of "whether appellant's due process rights were violated by the state trial court's failure to allow him a continuance" (JA 232). The court affirmed the district court's decision on the basis that the Missouri Court of Appeals decision was based on independent and adequate state grounds (JA 233-235). The court below also rejected Lee's claim that counsel's failure to comply with these rules was cause to excuse his default, because Lee never made an independent Sixth Amendment claim on this basis in state court (JA 234-235). Finally, the court below found that Lee could not meet the gateway actual innocence test for review (JA 235).

Lee's motion for rehearing or for rehearing *en banc* was denied on August 8, 2000, two judges dissenting. On February 26, 2001, this Court granted Lee's *pro se* petition for writ of certiorari.

SUMMARY OF ARGUMENT

This case is about federalism. The Missouri Court of Appeals did not reach Lee's due process claim because Lee failed to comply with well established and regularly enforced procedural rules for presenting his motion for continuance. There is no suggestion that these rules were interposed as a pretext to mask the Missouri courts' unwillingness to enforce Lee's constitutional rights. Rather, Missouri simply insisted -- as states must be able to do -- that criminal defendants give it the first chance to correct constitutional errors, and that they do so consistent with legitimate procedural rules. Since its inception, this Court has recognized states' rights to do this by enforcing the "adequate and independent state ground" doctrine.

Lee's arguments now threaten the allocation of power represented by two centuries of this Court's application of that doctrine. Lee would turn the "adequacy" element of that doctrine, which historically has served only the purpose of exposing subterfuges designed to frustrate federal review, into a free-form fairness test evaluating the state's application of procedural rules to each defendant's circumstances. Such a case-by-case balancing of state and federal interests ignores the balance already struck by the "independent and adequate state ground" doctrine. If this Court pursues the radical change of direction advocated by Lee, it will put the states in an intolerable position. States will be forced to choose between enforcing their procedural rules and inviting *de novo* review of federal claims years later in federal habeas proceedings, or abdicating control over their criminal procedures by resolving even improperly presented federal claims in order to avail themselves of the presumption of correctness in 28 U.S.C. § 2254(d). States should not have to make that choice.

If this Court declines to adopt the overhaul of the "adequate and independent state ground" doctrine that Lee suggests, and applies the law as it has been well established, Lee cannot prevail. The district court and the court below

found that Lee had defaulted his constitutional claims and no federal review was permitted. No one, including the dissent below, has found a basis to excuse Lee's default under either a "cause and actual prejudice" analysis, or by application of the gateway to review for probable actual innocence. Accordingly, the decision of the court below should be affirmed.

1. Lee's Procedural Default Bars Review of His Sole Remaining Claim

The court below limited Lee's certificate of appealability to the single issue of whether Lee's due process rights were violated when the state trial court refused to grant a continuance to locate his would-be alibi witnesses who had left the courthouse after the defense had begun to present its case. That issue, Ground Six of Lee's habeas petition, is the only claim to survive for review by this Court.

Lee asserted no due process claim to the trial court at the time his oral motion for a continuance was made and denied, nor did he claim a denial of due process in his new trial motion filed two weeks later. Lee made no specific federal constitutional argument on direct appeal regarding the denial of his continuance, other than a perfunctory reference to the United States Constitution in his Point Relied On, and cited no federal cases on this issue.

The Missouri Court of Appeals affirmed the trial court's denial of a continuance without reference to the United States Constitution or federal law. Rather, it affirmed by invoking the following state ground for its decision in this case: A Missouri appellate court will not reverse the denial of a motion for continuance if the motion either was not presented in writing as required by Missouri Supreme Court Rule 24.09 or was not supported by an adequate factual showing as required by Missouri Supreme Court Rule 24.10. Lee points to no decision in which a Missouri appellate court ever reversed a trial court's denial of a continuance in which the underlying motion had failed to comply with Rules 24.09

or 24.10. Thus, this ground has been firmly established and regularly enforced. This rule is rationally related to the legitimate state interests of: (i) encouraging litigants to place before trial courts information that is sufficiently adequate and reliable to permit a trial court to make a well-reasoned decision on a motion to grant continuance, and (ii) requiring the creation of a record permitting more accurate appellate review of trial court decisions. Accordingly, this rule is an adequate state law ground on which to enforce Lee's procedural bar.

2. The Procedural Bar to Review of Lee's Claim Cannot be Excused

Lee claims that he has shown "cause" sufficient to excuse his default because he alleges that someone official tricked his would-be alibi witnesses into leaving the courthouse before they could testify. But nothing his would-be alibi witnesses did or were told caused Lee to ignore completely the long-standing Supreme Court rules governing motions for continuance. Counsel's compliance with these rules was still practicable, and still would have served a legitimate state interest as the present litigation demonstrates. Moreover, Lee never presented this allegation of cause to any Missouri court having an opportunity to address such an allegation consistent with Missouri procedural rules. Finally, to the extent Lee now suggests that prosecutorial misconduct was "cause" for his default (which would fail for the same lack of causal relationship just described), Lee should not be permitted to assert a "cause" that was not separately preserved as a constitutional claim in state court and the district court has already found that Lee's prosecutorial misconduct claim was defaulted.

Not only has Lee failed to show "cause," he cannot show "actual prejudice." Three family members offering an alibi that is flatly contradicted by four of the state's witnesses, including two eyewitnesses to the murder who testified that

Lee drove the getaway car, cannot be sufficient to meet that standard. The Missouri Court of Appeals, applying a much lower standard during Lee's direct appeal, found that Lee could not show even a reasonable probability that his alibi evidence would have changed the outcome of the trial. The district court, in considering Lee's habeas petition, reached the same conclusion. In the court below, even the dissenting judge conceded that Lee could not show cause and actual prejudice.

Finally, Lee cannot access the gateway to review defined by this Court in *Schlup v. Delo*, 513 U.S. 298 (1995), for new evidence of actual innocence that was excluded or otherwise unavailable at trial. If it cannot be said that Lee's alibi evidence would have created a reasonable probability of an acquittal, it certainly cannot be said that no juror could have convicted in light of this testimony, as *Schlup* requires.

More importantly, the affidavits of Lee's would-be alibi witnesses should not even be considered as "new evidence" in a *Schlup* analysis. With due diligence, Lee could have presented this information to the trial court in his motion for new trial, when the trial court still had jurisdiction to correct any error. Lee did not do that and should not now be able to claim that testimony of his family members -- to whom he has always had unfettered access -- should be considered "new" so as to excuse or avoid the procedural default of his due process claim.

3. The Denial of Lee's Oral Motion for Continuance Did Not Violate Due Process

Because Lee failed to abide by Missouri procedural rules requiring a motion for continuance, and the facts supporting it, to be in writing, we do not know precisely what facts the trial court considered when it denied Lee's motion other than that: (i) Lee's would-be alibi witnesses had been in the courthouse that morning, (ii) they probably left after the defense began to present its case, and (iii) Lee said he did

not think they had returned to California because they had plans in Kansas City for that evening.

No one offered any explanation for the departure of Lee's witnesses, other than Lee's counsel who suggested someone might have "threatened them," though he admitted he had no basis for that theory. No one offered the trial court any assurance that Lee's witnesses would be located in a reasonable time. Finally, no one told the trial court what the testimony of these family members would be and why it was of sufficient importance to justify a continuance on the last day of trial. Perhaps the trial court was able to fill in these blanks on its own, particularly as to the subject matter of the witnesses' testimony, by recalling the jury *voir dire* and Lee's opening statement from days earlier. If Lee's motion for continuance had complied with Missouri Supreme Court Rules 24.09 and 24.10, however, those facts would have been prominently presented to the trial court and preserved for this Court's review. Because of Lee's default, we can only guess at what the trial court knew or was told.

On a record such as this, it cannot be said that the trial court violated due process through a "myopic insistence upon expeditiousness in the face of a justifiable excuse for delay." *Unger v. Sarafite*, 376 U.S. 575, 589 (1964).

4. An Evidentiary Hearing Is Not Permitted By Law and Would Serve No Purpose

In an effort to be excused from his procedural default, Lee seeks an evidentiary hearing to help him establish "cause" for his default or, in the alternative, to show that he is "probably actually innocent." Lee also seeks an evidentiary hearing to develop his Ground Three claim, prosecutorial misconduct or official interference, by showing that someone official tricked his would-be alibi witnesses into leaving.

Pursuant to 28 U.S.C. § 2254(e)(2), Lee is entitled to an evidentiary hearing to develop the factual predicate of his claim only if that factual predicate could not have been

discovered previously with due diligence and if, in light of those facts, no reasonable juror could have convicted Lee had the constitutional error not occurred. Lee cannot meet this standard.

Lee is not entitled to an evidentiary hearing on the "cause" he alleges, *i.e.*, that his would-be alibi witnesses suddenly disappeared, because such a "cause" does not depend on why Lee's would-be alibi witnesses left, only that they did leave. Therefore, a hearing would serve no purpose on this issue. For this same reason, Lee is not entitled to an evidentiary hearing on his claims of actual innocence because an explanation for why his would-be alibi witnesses left, whatever it may be, is wholly irrelevant to Lee's guilt or innocence.

This leaves only Lee's request for an evidentiary hearing to develop a factual basis for his prosecutorial misconduct claim (Ground Three). The district court rejected that claim on the ground that Lee defaulted it by not raising it in his new trial motion or direct appeal. Even if Lee were entitled to pursue that claim, Lee is still not entitled to an evidentiary hearing because the evidence he wants to produce, *i.e.*, his would-be alibi witnesses' explanation for why they left, was available to him through the exercise of due diligence immediately following the last day of his trial, easily in time to be presented to the trial court in Lee's motion for a new trial.

Finally, as discussed several times above, had the alleged constitutional error not occurred and had Lee's would-be alibi witnesses presented their testimony, the most that could be said is that the jury might not have convicted Lee. This is far short of establishing that no reasonable juror could have convicted, which is the showing that 28 U.S.C. § 2254(e)(2)(B) requires.

ARGUMENT

I. Lee's claim that his due process rights were violated by the denial of his oral motion for continuance may not be reviewed by a federal court because it was rejected by the Missouri Court of Appeals on independent and adequate state grounds.

On February 24, 1994, the last day of Lee's three-day trial, he sought a continuance because his would-be alibi witnesses could not be found. In his federal habeas petition, filed nearly four years later, Lee claims that the trial court's denial of that continuance violated Lee's due process rights.[2] This is the only claim before this Court.

The Missouri Court of Appeals affirmed the trial court's denial of Lee's motion for continuance because that motion failed to comply with Missouri Supreme Court Rules 24.09 and 24.10 in that Lee's motion was not in writing, it was not supported by an affidavit, and it was not supported by a sufficient factual basis establishing the materiality of the witness's testimony and the likelihood that the witness could be located and produced in a reasonable period of time. The Missouri Court of Appeals did not expressly address the Due Process Clause, but did hold that, even had Lee's alibi

[2]Lee never fairly presented his due process claim to a Missouri court. He did not allege a due process violation in his oral motion for continuance, or in his objection to its denial. Lee did not allege a due process violation in his motion for new trial filed two weeks after trial (JA 20-25, 30-31). Finally, although Lee made a perfunctory reference to the Due Process Clause in his Point Relied On on direct appeal, he did not fairly present this question to the Missouri Court of Appeals because the argument section of Lee's brief contained no specific constitutional argument and no citation to federal authority (JA 110-115), and thus preserved no constitutional question for Missouri appellate review, *see Missouri v. Isa*, 850 S.W.2d 876, 900-901 (Mo. 1993) (en banc).

evidence been presented, there was no reasonable probability that an acquittal would have followed due to the strength of the state's case against Lee.

Thus, the Missouri Court of Appeals disposed of Lee's due process claim on the independent and adequate state ground that a trial court's denial of a continuance will not be reversed on appeal where the motion did not comply with the requirements of the applicable Supreme Court Rules. Under *Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977) and *Coleman v. Thompson*, 501 U.S. 729, 730-31 (1991), Lee's procedural default bars federal review of his claim in this habeas proceeding.

Lee concedes that the ground cited by the Missouri Court of Appeals for disposing of his due process claim is "independent" of the federal law question he sought to raise. Lee contends, however, that the state law ground relied upon by the Missouri Court of Appeals is not "adequate" to bar habeas review of his due process claim.

A. The adequate and independent state ground doctrine, jurisdictional in some contexts, serves important policies of comity and federalism in the context of federal habeas review.

Lee's argument that his due process claim is not barred by his procedural default in state court runs directly contrary to the history and purpose behind the doctrine that a federal court will not reverse a state court judgment supported by an independent and adequate state law ground.

In *Murdock v. City of Memphis*, 20 Wall. 590 (1874), prompted by The Judiciary Act of 1867 which expanded the scope of this Court's review of state court decisions, this Court analyzed what type of review it should perform when a case involving a federal question is decided by a state court on the basis of state law. This Court held that, even though a federal question had been wrongly decided by a state court,

this Court must not reverse the state court judgment if the judgment is supported by a sufficient non-federal reason for the decision. *Id.* at 634-636. *Murdock*, however, merely reaffirmed a principle that this Court has recognized from its foundation, specifically that a state judgment that relies on an independent and adequate state ground supporting the judgment will not be reviewed by this Court. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). *See also Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (noting that this rule was firmly established at least as early as *Klinger v. Missouri*, 13 Wall. 257, 263 (1872)). As this Court noted in *Coleman v. Thompson*, 501 U.S. 722, 730 (1991), this Court lacks jurisdiction to review a state court judgment that rests on an independent and adequate state ground because such would be merely an advisory opinion. *Id.* at 730 (*citing Herb*, 324 U.S. at 125-126).

Coleman recognized that this same principle applies in habeas corpus proceedings where a state court disposes of the federal claim on an independent and adequate state ground, despite that habeas petitions challenge custody rather than the state court judgment itself. *Coleman*, 501 U.S. at 729-730.

> Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-731.

The application of the independent and adequate state law rule in habeas cases preserves the integrity of states' rights to control their own rules of criminal procedure, *Coleman*, 501 U.S. at 731, and the right of the states to correct their own constitutional errors made in criminal trials, *Coleman*, 501 U.S. at 732. If this rule is not carefully and consistently applied, however, states will constantly have to

choose which of these two rights, in practice, will be sacrificed. Enforcing a procedural default would simply invite *de novo* review of a constitutional claim in federal court; and even though declining to enforce a state procedural default will preserve federal deference to the merits decision under 28 U.S.C. §2254(d), it forfeits a state's control over its criminal procedure.

Lee makes no direct challenge to the adequate and independent state ground doctrine. Instead, Lee seeks to constrict the definition of what constitutes an "adequate" state ground, arguing that "adequacy" can only be demonstrated if the precise default asserted can historically be shown to have been enforced in precisely the same circumstances. But such a narrow definition of adequacy necessarily would contract the power of the states -- and expand the jurisdiction and power of the federal courts -- in all state cases (civil or criminal) involving a federal issue. There is simply no basis, in this case or any other, for such a significant reallocation of power in this context. Accordingly, Lee's arguments should be rejected.

B. A state ground is "adequate" for purposes of enforcing a procedural default if it is firmly established and regularly enforced at the time of the petitioner's default, and if the ground asserted is rationally related to a legitimate state interest.

The concept that a state ground, explicitly cited as the reason for a state court's decision and broad enough to justify the decision, may not be "adequate" to prevent federal review arises out of this Court's concern that the state ground asserted may be a legal fiction invented to deprive a federal court of jurisdiction, and not the real reason for the state court's decision at all. *See Rogers v. Alabama*, 192 U.S. 226, 258-259 (1904) (rejecting an Alabama Supreme Court ruling that a two page motion to quash a grand jury due to the

exclusion of African-Americans was unnecessarily long, and holding that a federal court may inquire whether the state law ground "was the real one or whether it was set up as an evasion"); *Ward v. Board of County Commissioners*, 253 U.S. 17, 22 (1920) (holding that this Court may determine whether a state ground offered without fair support is merely a subterfuge to hide a decision on the federal issue); *Terre Haute & Indianapolis RR Co. v. Indiana*, 194 U.S. 579, 589 (1904) (holding that to allow a state court to rely on an untenable construction of state law would provide an easy method to avoid the jurisdiction of this Court).

To ferret out such efforts at subterfuge, this Court has developed a two-prong test. First, the state ground must have been firmly established and regularly enforced at the time of the petitioner's default. Second, the state ground asserted must be rationally related to a legitimate state interest. Where both these characteristics are present, this Court has been satisfied that the asserted state ground is a genuine and good faith attempt by the state to police its own procedures, and has held that federal review of the petitioner's defaulted federal claim is barred.

1. "Adequate" state grounds are firmly established and regularly enforced.

In *Staub v. City of Baxley*, 355 U.S. 313, 318 (1958), this Court found that a state procedural rule that was inconsistently applied and often ignored in Georgia Supreme Court precedents was not an "adequate" state ground to foreclose federal review of the underlying federal issue, thus foreshadowing the "firmly established and regularly enforced" test. *Id.* at 320. Later cases refined that test. *See Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (federal review not barred by state procedural grounds "not strictly or regularly followed"); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (federal review not barred by state procedural ground never before applied with such "pointless

severity"). Finally, in *James v. Kentucky*, 466 U.S. 341, 348 (1984), this court adopted this test in its current form, holding that only state procedural grounds that are "firmly established and regularly followed" will be "adequate" to bar federal review of the underlying federal claim.[3] *See also Ford v. Georgia*, 498 U.S. 411, 423-424 (1991).

As noted above, the purpose of the "firmly established and regularly followed" test is to identify instances in which a state court rejects a federal claim on federal grounds but engages in a subterfuge by interposing a state ground to avoid federal review. Application of this test has repeatedly revealed such legal fictions. *See e.g., Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (rejecting a default based on a claim's not being raised on direct appeal when binding precedent from the state's highest court dictated the claim should have been raised in a post-conviction motion and not on direct appeal); *Barr v. City of Columbia*, 378 U.S. 146 (1964) (deficient objection was not an adequate reason to refuse to review constitutional claim when South Carolina Supreme Court held identical objections sufficient three times in the two months before *Barr* and again held the objections sufficient a few weeks later); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. at 297 (alleged error in organization of brief that was the purported reason for the state court decision was a minor error, if an error at all, and the rule, allegedly violated, was routinely not enforced in cases of much more serious organizational errors); *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958) (procedural rule enforced was inconsistent with long standing state supreme court decisions);

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[3]"Regularly enforced" or "regularly followed" does not mean that a state court cannot occasionally excuse default and grant relief without forever forfeiting the right to invoke that procedural rule in future cases. *See Harris v. Reed*, 489 U.S. 255, 265 n.11 (1989). However, if a state ground is applied infrequently, unexpectedly, or freakishly, lower federal courts have viewed this as evidence of discrimination against a federal right. *Prihoda v. McCaughtry*, 910 F.3d 1379, 1383 (7th Cir. 1990).

Wright v. Georgia, 373 U.S. 284, 291 (1963) (procedural rule, that an appellate brief explicitly link the argument to a claim in the new trial motion, had never before been enforced in any published case); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958) (procedural rule that contempt citation may be exclusively challenged in mandamus was apparently contrary to existing precedent and had never before been announced and therefore novelty defeated the adequacy of the ground even if the rule could retroactively be fit into a consistent pattern of procedures).

2. "Adequate" state grounds are rationally related to a legitimate state interest.

If an asserted state ground is firmly established at the time it is enforced and it has been regularly enforced in other cases, it is generally correct to conclude such ground will be adequate to prevent federal review. There is, however, a class of rules which do not fit neatly within this test. An example of such a rule is discussed in *Carter v. Texas*, 177 U.S. 442 (1900), in which Texas required challenges to the makeup of a grand jury to be made before the jury was impaneled, but had impaneled the grand jury in a defendant's case before the offense was committed. Such a rule might be firmly established and regularly enforced, but the only purpose it serves is to effectively prevent any challenge to the racial make up of the grand jury. Rules of this type can be easily identified by asking whether the rule is rationally related to a legitimate state interest. *See Davis v. Weschler*, 263 U.S. 22, 25 (1923) (noting local practice shall not be allowed to put "unreasonable" obstacles in the way of federal review); *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958) (state cannot insist upon compliance with an "arid ritual of meaningless form"); *Henry v. Mississippi*, 379 U.S. 443, 447 (1965) (compliance with procedural rule must serve legitimate state interest for rule to bar federal review); *Osborne v. Ohio*,

495 U.S. 103, 124-125 (1990) (citing *Douglas v. Alabama*, 380 U.S. 415 (1965), for the proposition that requiring patently futile repetition of an already rejected objection does not serve a legitimate state interest).

But a state ground that does serve a legitimate state interest, in addition to being firmly established and regularly enforced at the time of the default, reliably is not a subterfuge to mask a state court determination of a federal right and should continue to be respected by the federal courts. Such respect can only be shown by enforcing the procedural bar to federal review of such defaulted claims.

C. Missouri procedural rules relating to motions for continuance were firmly established decades before Lee's trial, and the rules governing appellate review of the denial of motions that did not comply with those rules have been enforced without exception.

Under Missouri law, a trial court's denial of a motion for continuance will not be reversed if the application was not in writing and supported by an affidavit, as required by Missouri Supreme Court Rule 24.09, or if it did not contain the information required by Missouri Supreme Court Rule 24.10. This rule of appellate review was well established prior to Lee's trial, and it is regularly enforced by the Missouri Court of Appeals and the Missouri Supreme Court. Lee, in short, defaulted his right to appeal the trial court's decision on his continuance request by not making a proper application for continuance, and it was this default that was enforced by the Missouri Court of Appeals.

The appellate courts of Missouri have repeatedly and consistently held that the failure to place a motion for continuance in writing is a sufficient reason for affirming a trial court's denial of continuance. *See, e.g., Missouri v. Shryock*, 593 S.W.2d 906, 909 (Mo. Ct. App. 1980) (former

Missouri Supreme Court Rule 25.08 contemplated a written motion for continuance and failure to file a written motion is a sufficient reason to affirm the denial of a continuance); *Missouri v. Diamond*, 647 S.W.2d 806, 808 (Mo. Ct. App. 1982) (denying motion for continuance for the sole reason that the motion failed to comply with Missouri Supreme Court Rule 24.09); *Missouri v. Merrick*, 677 S.W.2d 339, 342 n.2 (Mo. Ct. App. 1984) (failure to comply with Missouri Supreme Court Rule 24.09 is sufficient reason to affirm the denial of a continuance); *Missouri v. Tettamble*, 746 S.W.2d 433, 439 (Mo. Ct. App. 1988) (same); *Missouri v. Drewel*, 835 S.W.2d 494, 496 (Mo. Ct. App. 1992) (same).

Similarly, the appellate courts of Missouri have repeatedly and consistently held that failure to include the information required by Missouri Supreme Court Rule 24.10 in a motion for continuance is a sufficient reason to affirm the denial of a continuance. *See, e.g., Missouri v. Cuckovich*, 485 S.W.2d 16, 21 (Mo. 1972) (en banc) (failure to comply with Missouri Supreme Court Rule 25.08(b) -- the predecessor to Missouri Supreme Court Rule 24.10 -- was in itself sufficient ground to affirm the denial of a continuance in a case in which a defense witness was allegedly too ill to come to court on the day of trial); *Missouri v. Settle*, 670 S.W.2d 7, 13-14 (Mo. Ct. App. 1984) (trial court did not err in denying motion for continuance that did not comply with Missouri Supreme Court Rule 24.10); *Missouri v. Dodd*, 10 S.W.3d 546, 554-555 (Mo. Ct. App. 1999) (failure to comply with Missouri Supreme Court Rules 24.09 and 24.10 is sufficient reason to sustain the denial of a continuance).

Lee does not offer even a single instance in which any Missouri appellate court has ever reversed a trial court's denial of a motion for continuance in a case in which the motion did not comply with Missouri Supreme Court Rules 24.09 or 24.10. Instead, Lee presents two arguments why that fact alone should not control the analysis in this case.

First, Lee argues that the state ground in this case, *i.e.*, that an appellate court will not reverse a denial of a

motion for continuance if that motion does not comply with Rules 24.09 and 24.10, was not "firmly established" with respect to circumstances such as Lee's in which the disappearance of the witnesses was truly unexpected (Petitioner's Brief 35). Second, Lee argues that, even if this state ground was firmly established, it was not "regularly enforced" because, in affirming denials of motions for continuances that did not comply with these rules, Missouri appellate courts sometimes relied upon the fact that the underlying motion lacked merit (Petitioner's Brief 31-34), or took note of the fact that the trial court had taken some effort to locate a missing witness before denying a motion for continuance that otherwise failed to comply with Rules 24.09 and 24.10 (Petitioner's Brief 35-36). Both arguments fail because both ignore Missouri law.

1. The state ground at issue was firmly established, even in cases of exigency, regardless of whether Lee's precise fact situation had ever been litigated before.

Lee's first argument -- that compliance with Rules 24.09 and 24.10 would not be required in cases where the disappearance of a witness was truly unexpected -- is plainly wrong. These rules state in mandatory language what "shall" be in a motion for continuance and the form such a motion "shall" take. The plain language of these rules contains no exceptions for exigent circumstances. Indeed, Rule 24.10 deals specifically with motions for continuance based upon a missing witness, whether sudden or not. Moreover, Lee's characterization of Missouri cases is simply wrong.

Missouri appellate courts for decades have affirmed the denial of continuances due to the insufficiency of an application for continuance even when a witness became unavailable on short notice. *See e.g. Missouri v. Gadwood*, 116 S.W.2d 42, 49-50 (Mo. 1937) (defendant's counsel

received a letter two days before trial that witness might be too ill to attend trial, and phone call on the day of trial from witness's wife saying he was too ill to attend, but produced only hearsay rather than affidavits containing proper evidence to support the motion for continuance); *Missouri v. Cuckovich*, 485 S.W.2d 16, 21 (Mo. 1972) (en banc) (defendant's wife, a material witness, was allegedly too ill to attend court on the day of trial, but motion for continuance did not comply with the rule and a hearsay letter from physician was inadequate support for the motion); *Missouri v. Scott*, 487 S.W.2d 528, 530 (Mo. 1972) (the only non-law enforcement witness to an incident in which a defendant allegedly struck a law enforcement officer did not appear to testify at trial but motion for continuance did not comply with former Rule 25.08); *Missouri v. Settle*, 670 S.W.2d 7, 13-14 (Mo. Ct. App. 1984) (witness's vehicle had allegedly broken down in Arizona, but motion for continuance did not comply with Rules 24.09 or 24.10); *Missouri v. Freeman*, 702 S.W.2d 869, 873-874 (Mo. Ct. App. 1985) (when defendant's sister who had been subpoenaed as a defense witness did not appear, a written motion for continuance filed at the close of the state's case was denied because it did not contain the information required by Rule 24.10, and was not supported by an affidavit and the witness had told the serving officer she would not appear and lie for her brother).

These cases, stretching back more than sixty years, firmly establish that a Missouri appellate court will not reverse a denial of a motion for continuance that was not in proper form, even where the need for the continuance was "truly unexpected." Lee does not point to a single Missouri appellate decision reversing the denial of a continuance -- even when counsel had little notice that a witness would not be available to testify -- if the motion for continuance was defective. The best Lee can do is cite two cases for the proposition that Missouri case law might excuse such a failure to comply (Petitioner's Brief 35). The cases cited, however, do not stand for that proposition.

In *Missouri v. McCarter*, 820 S.W.2d 587, 589 (Mo. Ct. App. 1991), the Missouri Court of Appeals affirmed the denial of an oral motion for continuance, made on the day of trial due the absence of an alleged eyewitness, relying on Rules 24.09 and 24.10 and cited the general principle that failure to comply with Rule 24.09 is itself sufficient reason to deny a motion for continuance. *Id.* The Court of Appeals also pointed out that this is "particularly true where the factual basis for the motion was not a last minute or unexpected surprise." *Id.* Lee would substitute "only true" for "particularly true," but that is not what the court said.

Similarly, in *Missouri v. Adams*, 808 S.W.2d 925, 928-930 (Mo. Ct. App. 1991), the Missouri Court of Appeals affirmed the denial of an oral motion for continuance, citing Missouri Supreme Court Rule 24.09. There, counsel had not attempted to subpoena the witnesses until the day before trial, had announced ready for trial despite their absence and only made an oral request for continuance after *voir dire*. *Id.* Contrary to Lee's suggestion, the court merely commented appellant would have had a stronger argument had he subpoenaed his witnesses in a timely manner and had their absence been caused by illness, accident or some other unexpected cause. *Id.*

McCarter and *Adams* cannot be fairly read in the context of existing Missouri precedents to hold or even suggest that failure to file a proper motion will be excused by an appellate court in the case of a sudden and unexpected disappearance of a witness. Instead, the Missouri Court of Appeals was simply criticizing defendants who had not been diligent in trying to find their witnesses and/or had not timely filed a motion for continuance upon learning that the witnesses would not appear. Missouri cases, including *McCarter* and *Adams*, firmly establish the ground that a denial of a motion for continuance will not be reversed on appeal if the motion failed to comply with applicable Supreme Court Rules.

2. The state ground at issue is regularly enforced even though appellate courts may cite other grounds in affirming a denial of a non-conforming motion.

Lee's second argument -- that the state ground at issue has not been regularly enforced -- fails as well. The state ground at issue is that Missouri appellate courts will not reverse a denial of a motion for continuance that does not comply with the applicable rules. Missouri appellate courts do not fail to enforce that rule if, as they affirm, they note that the underlying motion lacked merit. An appellate court may, of course, affirm the trial court for any reason supported by the record, just as in the present case where the appellate court relied on Rules 24.09 and 24.10 even though the trial court did not explicitly do so. To do so is not a failure to enforce the rule.

Lee cites several cases in which a trial court took some action to locate a missing witness based on an oral motion for continuance (Petitioner's Brief 35-36). Only two of these cases involved delay of the trial, and the holdings of these cases actually support Respondent's position.

In *Missouri v. Sneed*, 874 S.W.2d 489, 490-491 (Mo. Ct. App. 1994), the trial court recessed for several hours and issued a body attachment for a missing subpoenaed witness on the second day of a three-day trial. Ultimately, however, the trial court denied the defendant's motion for continuance and was affirmed by the Missouri Court of Appeals because the application did not comply with Rule 24.09. *Id.*

Similarly, in *Missouri v. Coats*, 835 S.W.2d 430, 433-434 (Mo. Ct. App. 1992) the trial court was faced with an oral motion for continuance in the middle of trial based on a missing witness. The trial court had the case proceed with the defendant testifying out of order, but continued the case on a Friday afternoon to give the defense time to find and produce the witness on the following Monday. *Id.* The trial

court's decision to deny the lengthier continuance sought by the defendant was affirmed because the application for continuance did not comply with Rule 24.09. *Id.*

Finally, Lee cites *Missouri v. Gasaway*, 720 S.W.2d 3, 5-6 (Mo. Ct. App. 1986). In *Gasaway*, a subpoenaed witness did not appear on the second day of trial and the trial court issued a writ of body attachment. On the third day, however, the trial court denied a motion for continuance. *Id.* This denial was affirmed because the application for continuance did not comply with Rule 24.10. Thus, the cases Lee cites as evidence that the relevant state ground of appellate review has not been regularly enforced actually stand as examples of cases in which the appellate courts enforced the rule in question.

D. Missouri Supreme Court Rules 24.09 and 24.10, and related rules of appellate review, serve the legitimate state interest of requiring the party seeking a continuance to place before the trial court in an orderly and reliable manner all facts necessary to determine the issue, and to memorialize those facts so as to facilitate appellate review.

The state ground asserted in this case is that a Missouri appellate court will not reverse a trial court order denying a motion for continuance if the motion did not comply with Missouri Supreme Court Rules 24.09 and 24.10. These rules work together to enhance the reliability of a trial court's determination of whether to delay a scheduled criminal[4] trial due to the absence of a witness. They do so in

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[4]Missouri has similar rules for civil trials. *See* Missouri Supreme Court Rules 65.03, 65.04 and 65.05. Compliance with the rules governing motions for continuance by all litigants, civil and criminal, serve the same

a fashion that, if complied with, facilitates meaningful appellate review. These are legitimate state interests.

Rule 24.10 sets forth the information required in a motion for continuance due to a missing witness. Rule 24.09 enhances the reliability of that information by requiring it to be in writing, and therefore presumably more thoughtfully prepared, and provides assurance the information is reliable[5] by requiring an affidavit setting forth the facts on which the application is based. Thus, Rules 24.09 and 24.10 are clearly related to legitimate state interests.

Lee argues that, even assuming Rules 24.09 and 24.10 serve a legitimate purpose generally, they served no legitimate purpose in his case (Petitioner's Brief 34-41). In short, Lee argues that compliance with Rule 24.09 was impossible, and that he substantially and sufficiently complied with Rule 24.10. Lee is wrong on both counts.

Nothing would have prevented counsel from drafting a brief motion and affidavit complying with Rules 24.09 in longhand while seated in the courtroom. If counsel had complied with Rule 24.09, doing so would have provided counsel a framework for complying with the factual showing that Rule 24.10 requires, which his oral motion did not show.

Lee's oral motion for continuance did not come close to containing the information required by Rule 24.10 (JA 20-22). Among other things, Rule 24.10 requires the motion and affidavit to state facts showing the materiality of the evidence

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legitimate state interests.

[5]*See Missouri v. Cuckovich*, 485 S.W.2d 16, 21 (Mo. 1972) (en banc) (trial court properly denied continuance when the only evidence offered to support allegation that a material witness was absent on the day of trial due to illness was a letter from a physician that was not considered because it was hearsay); *Missouri v. Madison*, 997 S.W.2d 16, 21 (Mo. 1999) (en banc) (opening statements and closing arguments are not evidence).

the missing witness would supply. Lee's counsel never mentioned during his oral motion for continuance the testimony he expected the missing witnesses to give. Rule 24.10 requires that the motion and affidavit set forth the facts giving rise to a reasonable belief that the witness can be located within a reasonable time. Lee's counsel gave the trial court no reason to believe that the missing witnesses could be located within a reasonable time, only that Lee said he did not think they had left Kansas City. The only information given the trial court in the oral motion for continuance was that the witnesses had been subpoenaed for that morning, that they had been in the courthouse until after the start of defendant's case, and that they were missing. Lee's counsel offered to locate an address to use for a capias warrant, but had no assurance the witnesses were there (JA 20-22).

Lee argues that, if the trial court had reviewed the entire record before it, including *voir dire* and opening statements, it could have filled in the gaps in Lee's oral motion (Petitioner's Brief 37-39). This ignores the point of the rule. Even if the trial court could find the required information by review of the entire record, which is questionable at best,[6] the point of Rules 24.09 and 24.10 is to put specific information in front of the trial court in a reliable form that the court can easily and intelligently rule on, and to give an appellate court precisely the same information for

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[6]Nothing in the record available to the trial court demonstrated reasonable grounds for belief that the witnesses would testify in a reasonable time. In fact, in his written motion for a new trial filed two weeks later, Lee offered no explanation for the disappearance of his would-be alibi witness, let alone any representation that counsel would have been able to produce them had the continuance he sought been granted. Moreover, at a hearing on counsel's effectiveness under Missouri Supreme Court Rule 29.07 held nearly two months after trial, counsel again failed to provide any such explanation or assurance and, in fact, stated that the witnesses "left before they could testify. They went back to California" (JA 37). Lee did not disagree with this or seek to provide any such explanation or representation himself (JA 37-40).

later review to determine if the trial court abused its discretion. This legitimate purpose is frustrated if the movant's failure to comply forces the trial court to assemble this information on its own.

Rules 24.09 and 24.10 serve legitimate state interests generally, and did so in this case. Because the Missouri Court of Appeals likely may not have considered that it had a federal claim properly before it,[7] this is not a case in which the Missouri Court of Appeals sought to prevent federal review of the denial of Lee's federal claim through the subterfuge of interposing state procedural rules.

E. This Court should not abandon the traditional tests this Court has established for "adequacy" in favor of the balancing test Lee proposes.

This Court's traditional tests for adequacy -- "clearly established and regularly enforced" and "rationally related to a legitimate state interest" -- confirm that the Missouri ground at issue, *i.e.*, that a denial of an oral or deficient motion for continuance will not be reversed on appeal, is truly adequate to bar federal review of Lee's underlying due process claim. Therefore, Lee advocates that this Court adopt a new test.

Lee argues that a state ground should not be considered "adequate" to bar subsequent federal review unless

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[7]Lee's failure to make a constitutional objection at trial, to put forward a constitutional theory in his new trial motion, and to make specific constitutional arguments in his direct appeal brief were all fatal under Missouri law to any review of his constitutional claim that the denial of a continuance violated due process. *See Owsley v. Bowersox*, 234 F.3d 1055, 1058 (8th Cir. 2000) (under Missouri law, a constitutional issue to be preserved for review, must be raised at the earliest time consistent with proper procedure, must cite the specific sections of the Constitution allegedly violated, must be raised in the new trial motion, and must adequately briefed on appeal).

the state's interest in enforcing its procedural ground in that case outweighs the overarching federal interest in reviewing federal claims. Lee relies on the dissent in the court below, which in turn relied on *dicta* from *Henry v. Mississippi*, 379 U.S. 443, 447 (1965) for the proposition that "a state procedural ground was adequate to preclude review of a federal constitutional claim only if it outweighed the strong federal interest in hearing federal claims" (JA 247-248).

The balancing test Lee advocates has already been explicitly adopted by the Sixth Circuit, which has stated the following: "The adequacy of the state ground is determined by examining the state's legitimate interests in the procedural rule in light of the federal interest in considering federal claims." *Reynolds v. Berry*, 146 F.3d 345, 347 (6th Cir. 1998). *See also Smart v. Scully*, 787 F.2d 816, 819-21 (2d Cir. 1986) (requirement that a motion to withdraw a guilty plea contain sworn statements of fact, though presumed legitimate, will not be enforced as procedural default because it served no legitimate or substantial state interest, and, therefore, "deliberate bypass" analysis required).

Such a balancing test, however, threatens a substantial setback to this Court's comity and federalism jurisprudence. The *dicta* in *Henry v. Mississippi* was denounced when uttered, *see Henry v. Mississippi*, 379 U.S. 443, 457-465 (1965) (Harlan J. dissenting) ("a severe dilution if not complete abolition of the concept of 'adequacy' as pertaining to state procedural grounds"), and was not followed in *Wainwright*, which undertook no balancing of the state and federal interests and relied, instead, on the "cause and prejudice" exception to prevent a miscarriage of justice in the extraordinary case.

As discussed in detail above, in *Coleman* and its predecessors, this Court has already balanced the state and federal interests and found that considerations of comity and federalism require these interests be balanced in favor of respecting a state's right to enforce its own procedures and correct its own errors by adhering to the "independent and

adequate state grounds" doctrine in federal habeas cases. The history and purpose of the traditional adequacy tests set forth above is to identify actual cases of state court subterfuge in which a state ground is disingenuously asserted to preclude federal review of a state court's federal decision -- and those tests have served that purpose well. Lee presents no reason why those tests should be abandoned, other than that a principled application of them in his case shows that his due process claim is procedurally barred from federal review.

Therefore, where a state procedural rule is rationally related to a legitimate state interest and that rule was firmly established and regularly enforced at the time of the default, and a default occurred and was relied on by the state courts, the state law reason for the state court decision is adequate to bar federal review of the underlying federal claim. Accordingly, the lower court should be affirmed.

II. Lee cannot establish any basis for this Court to excuse the procedural default enforced by the Missouri Court of Appeals.

When a procedural default is shown to bar federal habeas review of a state prisoner's constitutional claim, the prisoner must show something more than that his underlying claim is valid in order to overcome his procedural default. If the doctrine of procedural default barred only constitutional claims that were not or could not be proven, the doctrine would be meaningless. This Court has defined the "something more" that need be shown as: (i) "cause" for the default and "actual prejudice" stemming from the constitutional violation, *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); or (ii) new evidence of actual innocence in light of which no reasonable juror would convict, *Schlup*, 513 U.S. at 337. These exceptions adequately provide for the rare cases in which a strict application of procedural default might work a manifest injustice.

Lee alleges that his default should be excused either because he can show "cause" and "actual prejudice," or probable actual innocence. Lee cannot meet either of these tests, however, and review of his underlying due process claim is therefore properly barred.

A. Lee's allegation of cause to excuse his default is without merit because the cause he alleges has no causal connection with the default he alleges, and the allegation of cause is itself defaulted.

In *Wainwright*, this Court adopted the "cause and prejudice" test as a guarantee that the enforcement of state law procedural default would not cause a habeas petitioner to be "the victim of a miscarriage of justice." While leaving the precise definition of the terms to later cases, this Court found that a showing of cause for a procedural default, and actual prejudice arising from the default, could excuse a procedural default based on an adequate state ground in a habeas corpus case. *Wainwright*, 433 U.S. at 90-91.

This Court defined such "cause" in *Murray v. Carrier*, 477 U.S. 478, 488 (1986), which stated that "the existence of a cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* This Court noted that this test could be met by showing that "the factual or legal basis for a claim was not available to counsel [citation omitted] or that some interference by officials [citation omitted] made compliance impracticable." *Id.*[8]

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[8]To counsel's knowledge, this Court has found "cause" sufficient to excuse a state law procedural default in only three of its cases. *Reed v. Ross*, 468 U.S. 1, 16 (1984) (constitutional claim so novel at the time of trial it was not reasonably available to preserve and raise on appeal); *Amadeo v. Zant*, 486 U.S. 214, 217 (1988) (district attorney's office

1. Lee's allegation of cause had no effect on Lee's procedural default.

Lee alleges cause to excuse his procedural default exists because his alibi witnesses suddenly left the courthouse during trial and suggests that, if they left because they were told to by a court officer, this makes his showing of cause even stronger (Petitioner's Brief 42-43). Certainly, this "caused" Lee to seek a continuance, but that was not his procedural default. Lee's default was that his oral motion for continuance did not comply with Missouri Supreme Court Rules 24.09 and 24.10. Nothing that Lee's would-be alibi witnesses did "caused" Lee's counsel to ignore these firmly established and regularly enforced state procedural rules.

Whatever the exigencies, counsel could still have briefly drafted a written motion and affidavit -- on a legal pad if necessary -- and presented these to the court. The sudden disappearance of Lee's would-be alibi witnesses did not impede counsel's compliance with this rule or render compliance impracticable.

But, assuming for the sake of argument as the Missouri Court of Appeals did (JA 127), that Lee's failure to comply with Rule 24.09 could be excused under the circumstances, the failure of Lee's oral motion to comply with Rule 24.10 clearly cannot be excused by the circumstances. The oral motion for continuance (JA 20-22) did not set forth the materiality of the witnesses' testimony or the particular facts that they would prove as required by Missouri Supreme Court Rule 24.10(a) and (c). Nor is it fair to say that the entire trial record, much less Lee's oral motion

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directed jury commissioners to under represent women and African-Americans on the master jury list, and prosecutor did not deal honestly with defense lawyers as county officials concealed racial disparity on the jury lists); *Strickler v. Greene*, 527 U.S. 263 (1999) (prosecutor excluded exculpatory information from the file given to the defense, while stating that the defense had "everything known to the government").

for continuance, contains facts showing that the testimony of the witnesses could be obtained in a reasonable time, or that the witnesses were not absent with Lee's consent, as required by Missouri Supreme Court Rule 24.10(b) and (d). The sudden disappearance of Lee's would-be alibi witnesses did not impede counsel's compliance with Rule 24.10, or render such compliance impracticable.

It is important to note that the foregoing analysis does not depend on why Lee's alibi witnesses left. If, as in the Habeas Version, these witnesses left because a court official told them their testimony would not be needed until the next day, that fact would have had no greater or lesser "causal" relationship to Lee's counsel's failure to abide by Rules 24.09 and 24.10 than if -- as counsel stated -- he had no idea why they left. So, too, if the PCR Version is the truth and someone working for the prosecutor told Lee's would-be alibi witnesses they would not be needed at all. So it would be, as well, if Lee's would-be alibi witnesses left because they did not want to perjure themselves on Lee's behalf.

Accordingly, neither the disappearance of Lee's would-be alibi witnesses (for whatever reason), nor the state, nor any other external cause made it impracticable for Lee to comply with Supreme Court Rules 24.09 and 24.10. Therefore, under *Wainwright* and *Murray*, this allegation cannot suffice to excuse his default and federal review of Lee's underlying claim is barred.

2. Lee cannot seek to excuse his procedural default by alleging a "cause" that was, itself, defaulted.

To the extent that Lee's allegation of cause depends on why his would-be alibi witnesses left (*i.e.*, prosecutorial misconduct), this allegation necessarily fails for another reason. Neither Lee's new trial motion nor the direct appeal portion of his brief to the Missouri Court of Appeals, which necessarily tracked the new trial motion, alleged that a court

officer or anyone else told the witnesses to leave (JA 31-32, 90-95). Accordingly, Lee cannot raise as "cause" sufficient to excuse default. an allegation that was, itself, not properly presented to the Missouri courts. *See Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) (habeas petitioner could not allege ineffective assistance of counsel as cause to excuse default when he did not properly challenge counsel's effectiveness on the issue in state court); *Boliek v. Bowersox*, 96 F.3d 1070, 1072-73 (8th Cir. 1996) (habeas petitioner could not assert, as cause for default of claims, error by motion court in not allowing claims to be added when he did not challenge the order preventing further amendments in a state appeal).

It was not until July 3, 1995, when court-appointed counsel filed an amended post-conviction relief motion verified by Lee under oath as being true and correct to the best of his knowledge, that this allegation was made (JA 55-64). This motion alleged that the witnesses were told they could leave by an "unknown person" who it had since been learned was "believed to be working for the Jackson County Prosecutor's Office" (JA 58).[9] The prosecutor's response to this claim pointed out that it was not cognizable in a post-conviction proceeding and, further, that it simply was not possible to believe that defense witnesses would come 1,000 miles to testify and then leave at the direction of the prosecution without even talking to Lee or his counsel (Appellant's Addendum 12a-13a). The post-conviction review court agreed, and rejected this claim as not cognizable in a post-conviction proceeding because it should have been raised in the direct appeal (JA 70) (*citing Stuckey v. Missouri*, 756 S.W.2d 587, 590 (Mo.Ct.App. 1988) (trial errors or prosecutorial misconduct claims, even those affecting

[9]By the time this case reached federal court, the alleged person had changed from an employee of the Jackson County Prosecutor's Office into a "court security officer" (JA 237), referred to as "those people in Missouri" in one affidavit (JA 169), and as an "officer of the court" in two others (JA 172, 174).

constitutional rights, cannot be brought in a post-conviction relief action absent special circumstances that prevented the claim being brought in the direct appeal process)).

Lee has never put forward any reason -- far less a plausible reason -- why the PCR Version of the disappearance of Lee's would-be alibi witnesses, to say nothing of the more-recent Habeas Version of their disappearance, was not presented in his motion for new trial and preserved for direct appeal review. He had two weeks to prepare and file his new trial motion, more than enough time to call his mother, sister, and step-father and ask what happened. Even after he filed his motion, he had an additional six weeks to prepare for the hearing on that motion. But, at the hearing, when the trial court asked if he had anything to add to his written motion, Lee's counsel said "no." When the subject of the disappearance came up, Lee himself offered no explanation. Therefore, under Missouri law, Lee's claim that "someone official told my witnesses they could leave" was properly rejected as noncognizable by the post-conviction court, and has never properly been presented to the Missouri courts. Lee cannot now allege as cause for his default a theory that he never properly presented to the Missouri courts.

B. Lee cannot show "actual prejudice" because, even if the continuance had been granted and Lee's would-be alibi witnesses produced, alibi evidence from family members cannot create a probability of an acquittal when four other witnesses directly contradict Lee's alibi theory.

It is well established that, even if a habeas petitioner shows cause to excuse a state procedural default, he must also show actual prejudice from the underlying error before he may receive review of the underlying claim. *United States v. Frady*, 456 U.S. 152, 168-169 (1982). This Court has never precisely defined what "actual prejudice" is, but the

precedents of this Court present a clear picture of where in the continuum of prejudice "actual prejudice" should fall.

Frady tells us that "actual prejudice" is a "significantly higher" standard of review than the plain error[10] analysis used in review of unpreserved claims of error on direct appeal. *Frady*, 456 U.S. at 166. "Actual prejudice" must also necessarily require a greater showing than a reasonable probability that an alleged error changed the outcome of trial, which is the standard used to determine prejudice from a preserved due process claim. *See United States v. Bagley*, 473 U.S. 667, 682 (1985) (defining prejudice required to show a Due Process Clause violation for failure to disclose); *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (employing same standard for prejudice required to show ineffective assistance of counsel). *See also Zinzer v. Iowa*, 60 F.3d 1296, 1299 (8th Cir. 1995) (actual prejudice is necessarily a higher standard than *Strickland* prejudice). Finally, "actual prejudice" must be greater than a showing that the alleged error "had a substantial and injurious effect on the jury's verdict," which is the test for prejudice as part of a harmless error analysis for a non-defaulted claim in a habeas case. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

On the other hand, as this Court pointed out in *Murray*, "actual prejudice" under a *Wainwright* analysis is necessarily less than a showing that a constitutional violation has resulted in the conviction of one who is probably actually innocent. *See Murray*, 477 U.S. at 495-496. This later showing was developed as a test to provide relief in the rare case in which a fundamental miscarriage of justice occurred but the petitioner could not meet the cause and actual prejudice standard. *Id.* It necessarily follows that the level

[10] *See United States v. Young*, 470 U.S. 1, 15 (1985) (plain error defined as particularly egregious errors that seriously affect the fairness, integrity or public reputation of judicial proceedings in cases in which a miscarriage of justice would otherwise result).

of prejudice required in a gateway actual innocence claim, which does not require a showing of cause, is higher than "actual prejudice," which does require a showing of cause.

Therefore, a showing of "actual prejudice" requires more than plain error, more than *Bagley* or *Strickland* prejudice, and more than *Brecht* prejudice, but less than a probability that no reasonable juror would convict in light of newly discovered evidence. *See Schlup*, 513 U.S. at 337.

Both the Missouri Court of Appeals on Lee's direct appeal, and the district court considering Lee's habeas petition below, concluded that Lee could not show a reasonable probability that the outcome of trial would have been different had a continuance been granted (JA 128, 217). The district court correctly pointed out that there was "overwhelming evidence that Petitioner was in Jackson County on the day of the murder and the previous night" (JA 217, n. 3). Lee's presumably interested, closely related alibi witnesses were contradicted by four eyewitnesses who had no interest in seeing the wrong person convicted (JA 124-125; R.8; T.Tr. 450-453, 471-474). The court below did not reach this question because it found that Lee had not established "cause," but even the dissent conceded that, "[i]f Lee had been allowed a short continuance and had been able to present his alibi defense, he might very well have been acquitted, but he might also have been convicted" (JA 239). This is not "actual prejudice."

Lee's showing of prejudice does not even satisfy the *Bagley* or *Strickland* standards, *i.e.*, that a reasonable probability would exist that the outcome of trial would have been changed. Thus it is certain that Lee cannot meet the test for "actual prejudice," which is stricter still. Lee has therefore failed to meet the *Wainwright* test to have his procedural default excused and his underlying federal claim reviewed. Accordingly, the judgment of the lower court should be affirmed.

C. Lee has no new evidence of actual innocence sufficient to avail himself of the *Schlup* gateway because his alibi evidence is not newly discovered and because his alibi theory was refuted by four disinterested witnesses.

This Court defined the actual innocence gateway for review of procedurally defaulted claims in *Schlup v. Delo*, 513 U.S. 298 (1995). In *Schlup*, this Court held this gateway is available only if the petitioner makes "a showing that no reasonable juror would have convicted him in light of new evidence." *Id.* at 327.[11] This Court defined evidence that may be reviewed in such an analysis to include evidence that was either excluded or unavailable at trial. *Id.* at 328.

The court below rejected Lee's *Schlup* claim because the evidence Lee proffered (*i.e.*, the affidavits of his three family members claiming Lee was in California at the time of the murder and that they did not testify because an officer of the court had told them they could leave and come back the following day), was not "new" in that it was available to Lee at the time of trial and certainly in time to be presented in his new trial motion. The court below was merely applying the same due diligence test to claims defaulted in state court that Congress has now -- after *Schlup* -- applied to abusive claims defaulted by failure to raise a claim in an initial federal habeas petition. *See* 28 U.S.C. § 2254(e)(2)(B) (requiring a showing that the factual predicate of a claim could not be

[11]The United States District Court for the Eastern District of Missouri, following remand by this Court, found that habeas petitioner, Lloyd Schlup, had made a gateway showing of actual innocence. *Schlup v. Delo*, 912 F. Supp. 448, 455 (E.D. Mo. 1995). Schlup was scheduled for a new trial when, during voir dire, he pled guilty and admitted his participation in the murder. *See* Bob Watson, *Killer Lies to Get Off Death Row Then Pleads Guilty to Murder*, ***JEFFERSON CITY POST-TRIBUNE***, *March 24, 1999 at 1.*

discovered previously through due diligence, and clear and convincing evidence that no reasonable fact finder would have convicted but for constitutional error). There is no good reason not to apply the same due diligence standard to a state court default as to a default committed in the federal habeas process itself. In fact, principles of comity would seem to require that state prisoners be required to exercise at least the same degree of diligence in presenting their claims to state courts as they must employ in federal court.

In this case, the court below found that the factual basis for Lee's claim of actual innocence existed at the time of trial and could have been properly presented in state court (JA 235). This is accurate. There is no good reason that the substance of the information in the affidavits could not have been presented in the new trial motion, or at a hearing on the new trial motion, or at Lee's Rule 29.07 hearing, when the trial court could have acted on this information consistent with Missouri procedures (JA 31-32, 37-41).

In an alternative holding, the court below rejected Lee's actual innocence claim for the following reason: "Even assuming the alibi testimony was new evidence, Lee did not show with the required likelihood that reasonable jurors would not have convicted based on the word of three family members when the testimony of four prosecution witnesses refuted the alibi" (JA 235). Even the dissent agreed with this analysis pointing out that Lee still might have been convicted if the alibi testimony had been presented (JA 238-239).

This analysis is clearly correct. As set forth above, Lee's alibi testimony -- assuming it could ever have been procured -- would not have created a reasonable probability that the outcome of the trial would have been different. Because this testimony does not meet the *Bagley* or *Strickland* test for prejudice, and therefore cannot meet the higher standard of "actual prejudice," it is not possible that this same evidence satisfies the *Schlup* standard which is even higher still. This is especially true when the lack of credibility of the alibi witnesses is considered, together with the extreme

delay in offering an explanation why the alibi witnesses did not testify at trial, which *Schlup* teaches must also be considered. *Schlup*. 513 U.S. at 328. Lee simply does not make a showing of actual innocence under any reasonable reading of *Schlup*, and thus cannot avail himself of that gateway to federal review of his underlying federal claim.

III. Lee's underlying due process claim has no merit because the state court's resolution of this issue is presumed correct and, even under a *de novo* review, the claim lacks merit because the trial court did not deny the continuance based on an arbitrary and unreasoning insistence on haste in light of a justifiable request for delay.

Even if this Court excuses Lee's procedural default, or holds that one did not occur, Lee is still not entitled to any relief because his claim that the trial court's denial of his oral motion for continuance violated due process lacks merit.

The first two of the Missouri Court of Appeals' three alternative holdings relating to the denial of Lee's oral motion for continuance were procedural. The third holding was not:

> Even if the appellant established an abuse of discretion by the trial court in denying his motion, he cannot show prejudice thereby, which is necessary to prevail on this point.

(JA 128 (citation omitted)). This third alternative holding is a merits holding, albeit possibly limited to a state law abuse of discretion claim. But, because the Missouri Court of Appeals made no plain statement to the contrary, it should be presumed that the court was performing a federal law analysis.[12] *Harris v. Reed*, 489 U.S. 255, 263-265 (1989).

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[12]The type of prejudice analysis being performed by the Missouri Court of Appeals is appropriate to a preserved due process claim. *See United States v. Bagley*, 473 U.S. 667, 682 (1985) (defining prejudice

Having reached and resolved the federal claim on the merits, therefore, this resolution is entitled to the deference required in 28 U.S.C. §2254(d) and should not be disturbed unless it is contrary to, or an unreasonable application of, *Unger v. Sarafite* or other precedent of this Court.[13]

In *Unger v. Sarafite*, 376 U.S. 575, 588-593 (1964), this Court found that a denial of a continuance does not necessarily violate due process even if it prevents a party from having counsel or offering evidence. *Id.* But, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay" can violate due process *Id.* at 589. *See also Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (proper to inquire whether trial court employed an arbitrary and unreasoning insistence on haste). This analysis focuses on "the circumstances presented in every case particularly the reasons presented to the trial judge at the time the request is denied." *Unger*, 376 U.S. at 589. Thus, *Unger* focuses on whether the facts presented to the trial court demonstrated a substantial need for the witness and a substantial likelihood that witness would be produced in a reasonable time.[14]

In the present case, Lee did not present any facts to the trial court in his oral motion for continuance showing a substantial need for the missing witness, but asks this Court now to charge the trial court with having recalled Lee's counsel's comments on this issue in opening arguments and *voir dire*. Worse, there were absolutely no facts before the trial court on which it could have based a conclusion that the missing witnesses would be produced in a reasonable time.

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required to show a Due Process Clause violation for failure to disclose).

[13]*See Williams v. Taylor*, 529 U.S. 362, 412-413 (2000) (O'Connor, J. concurring) (defining the "contrary to" and "unreasonable application of" language of 28 U.S.C. §2254(d)).

[14]These critical facts under *Unger* closely track the showing required by Missouri Supreme Court Rule 24.10, with which Lee did not comply.

Lee offered no such assurance in his oral motion for continuance. More importantly, Lee did not assert in his new trial motion -- filed two weeks later -- that his would-be alibi witnesses were still in Kansas City the day they disappeared, or that they would have testified on the following Friday, or Monday, or any other day. Even with the benefit of four years of hindsight, there is nothing in the record credibly that shows that a one-day, or even a one-week, continuance would have produced these witnesses' testimony. Whether applying *Unger de novo* to the facts as presented to the trial court judge in Lee's oral motion for continuance, or determining whether the Missouri Court of Appeal's resolution of Lee due process claim on the merits was contrary to or an unreasonable application of *Unger* under 28 U.S.C. §2254(d), Lee has failed to establish any basis for relief.

Lee cites three cases in which he contends "this Court found that the denial of a continuance deprived the defendant of a fair trial in circumstances no more compelling than these" (Petitioner's Brief 25). None of these cases are on point. In *Pate v. Robinson*, 383 U.S. 375, 377-378 (1966), this Court affirmed the grant of habeas relief because a defendant was denied a competency hearing but explicitly declined to rule on a claim that a criminal trial was conducted in an unduly hurried manner without a fair opportunity to obtain expert psychiatric testimony. In *Chandler v. Fretag*, 348 U.S. 3 (1954), due process required a continuance when a *pro se* defendant charged with housebreaking and stealing three dollars was told on the day of trial he would be tried as a habitual offender subject to life imprisonment without the possibility of a parole. In *Reynolds v. Cochran*, 365 U.S. 525, 529 (1961), a defendant was arrested and apparently summarily convicted on the same day and sentenced to ten years' imprisonment for an offense that did not even exist. When he requested a two-day delay prior to trial, so that his retained counsel could arrive, the judge replied "No point in calling a doctor to a man already dead." *Id.*

It is not fair to say that Lee's case presents circumstances as compelling as those in *Chandler* and *Reynolds*. It simply cannot be said that the trial court violated the Due Process Clause based on the evidence presented to it, because as in *Unger*, that evidence did not provide a justified reason for delay.

And finally, even if a due process violation could be shown, *Brecht v. Abrahamson*, 507 U.S. 619 (1993) teaches that a writ of habeas corpus will not issue merely because there is a reasonable possibility that the trial error contributed to the verdict. *Id.* at 637. Rather, the error must have had "a substantial and injurious effect or influence in determining the jury's verdict." *Id.* In this case, the most that can be said is that the alleged error created a possibility that the verdict might have been different despite the four eyewitnesses that would contradict the alibi evidence. This is not sufficient to justify a writ of habeas corpus, and the judgment of the lower court should be affirmed.

IV. Lee is not entitled to an evidentiary hearing either to develop an entirely different constitutional claim that has long-since been separately defaulted and is not before this Court, or to develop his allegation of "cause," or to establish his "actual innocence."

Lee argues that this Court should remand for an evidentiary hearing so that he can prove that his would-be alibi witnesses were told by a court official to leave because their testimony would not be needed until the next day. This state interference, Lee claims, is a separate due process violation, and he should be permitted to pursue it (Petitioner's Brief 26). This is a distinctly different claim than the single claim on which the court below granted Lee a certificate of appealability, which was whether the denial of Lee's oral continuance motion violated his due process rights (JA 232).

Lee's "official interference" due process claim is nothing more than an attempt to revive his "prosecutorial misconduct" claim, Ground Three of his habeas petition (JA 155-156), which the district court found had been procedurally defaulted because Lee did not present it in his new trial motion or in his direct appeal (JA 213-16). The district court also denied Lee's request for an evidentiary hearing on how and why his would-be alibi witnesses left without testifying under 28 U.S.C. § 2254(e). Because Lee could have developed those facts before the trial court, and because the relevant information has been in the hands of Lee's own family members from the moment they walked out of the courthouse on the last day of the Lee's murder trial (JA 215),[15] the district court properly held that an evidentiary hearing was prohibited by 28 U.S.C. § 2254(e).[16] Both the district court and the court below refused to grant a certificate of appealability on the district court's disposition of Ground Three, or the denial of Lee's request for an evidentiary hearing. This Court should not permit Lee to circumvent the certificate of appealability process in this manner.

In any event, an evidentiary hearing on this claim would be a pointless act. Even if we assume as true the Habeas Version of the explanation for why Lee's would-be alibi witnesses left the courthouse, *i.e.*, a court officer told them to come back tomorrow, Lee's "prosecutorial misconduct" claim was defaulted long ago when he failed to include it in his new trial motion or his direct appeal. There

[15]Lee's argument that 28 U.S.C. § 2254(e) does not apply because he sought an evidentiary hearing in his post-conviction relief motion (Petitioner's Brief 27) must fail because the due process claim on which he sought the hearing is not cognizable in a post-conviction proceeding and the post-conviction court rejected the claim on that basis (JA 70).

[16]Lee's inability to meet either the due diligence requirement of 28 U.S.C. § 2254(e)(2), or the very high prejudice standard that section imposes, has already been addressed elsewhere in this brief.

are no grounds on which to excuse that default because there was no external "cause" for Lee's failure to include in his new trial motion a claim the predicate facts for which were in the hands of his family and could have been -- presumably would have been -- communicated to Lee or his counsel within hours of the end of Lee's trial. Moreover, "actual prejudice" cannot be shown for the same reasons as set out above. Regardless of why these witnesses left, only their alibi evidence would have been introduced at trial had the alleged constitutional error not occurred.

Lee also argues that this Court should remand for an evidentiary hearing "to determine why his witnesses left" as part of Lee's effort to establish "cause" for his procedural default of his due process claim relating to the denial of his oral motion for continuance (Petitioner's Brief 43). Lee is not entitled to an evidentiary hearing for that purpose because his witnesses' explanation for why they left could have no possible bearing on Lee's counsel's failure to abide by the Missouri Supreme Court Rules governing motions for continuance.[17] The material element of Lee's theory of cause -- already shown above to be inadequate -- was that the witnesses left suddenly, not why they left suddenly. An evidentiary hearing adds nothing to that claim nor renders Lee's inadequate assertion of cause suddenly an adequate one.

Finally, Lee claims he is entitled to an evidentiary hearing on the issue of his "actual innocence" under *Schlup*. Lee's failure to establish "probable actual innocence" as a gateway to obtaining federal review of his underlying due process claim is discussed at length above. An evidentiary hearing would add nothing to this. In evaluating whether Lee's alibi evidence constitutes new evidence of actual

[17]Lee admits this is true in his brief, in which he candidly remarks that "the reason for his witnesses' disappearance makes no difference to Lee's entitlement to relief, so long as that reason is not traceable to Lee or his counsel" (Petitioner's Brief 18).

innocence, it does not matter why Lee's would-be alibi witnesses left Lee's murder trial without testifying. That explanation, whatever it is, would not have been introduced in the murder trial and thus is not part of the "actual innocence" analysis, except insofar as the extreme delay between the disappearance of these witnesses and the first explanation for that disappearance may serve to damage the credibility of the alibi evidence they might give. Throughout Lee's habeas litigation, it has been presumed that his would-be alibi witnesses would have given the alibi testimony he claims for them. He does not need an evidentiary hearing now to prove what has always been presumed.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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